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No. 06-984

In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

STATE OF TEXAS

ON WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) (*Avena*), the International Court of Justice decided that, to remedy violations of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, in the cases of 51 named Mexican nationals, including petitioner, the United States must provide review and reconsideration of their convictions and sentences through a judicial process to determine whether the treaty violations caused actual prejudice, without regard to procedural default rules. On February 28, 2005, President Bush determined that the United States would comply with its international obligations under *Avena* by having state courts provide review and reconsideration to those 51 Mexican nationals. The Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the President's determination or the *Avena* decision. The questions presented are:

1. Whether the President of the United States acted within his authority under the treaties, statutes, and Constitution of the United States when he determined that the United States will comply with its treaty obligations by having state courts give effect to the *Avena* decision in the cases of the 51 Mexican nationals addressed in the decision.

2. Whether, absent the President's determination, a private party could enforce the *Avena* decision in state court.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the President validly determined that the United States will discharge its international obligations under the decision of the International Court of Justice (ICJ) in *Case Concerning Avena & Other Mexican Nationals* (*Mex.* v. *U.S.*), 2004 I.C.J. 128 (Mar. 31) (*Avena*), by having state courts give effect to the *Avena* decision. It also presents the question whether, absent the President's determination, the ICJ's decision would be privately enforceable in state courts. The United States has a substantial interest in the resolution of those issues.

STATEMENT

1. In 1969, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. See 115 Cong. Rec. 30,997. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. 292-293, concerns the ability of a foreign national to have consular officials notified of his detention.

In 1969, the United States ratified an Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, Art. I. See 21 U.S.T. 77, 700 U.N.T.S. 368. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Any party to the Optional Protocol may bring such a dispute with another party to the Protocol before the ICJ. *Ibid.* On March 7, 2005, the United States withdrew from the Optional Protocol. *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006). Article 94 of

the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, another Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

2. Petitioner, a Mexican national, was convicted of participating in the gang rape and murder of two teenage girls and sentenced to death. Pet. App. 2a. On direct review, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ibid.*

Petitioner then filed a habeas action in state court, claiming that Texas's failure to inform him of his rights under the Vienna Convention required reversal of his conviction and sentence. Pet. App. 2a. The state trial court rejected that claim on several grounds, including that petitioner's failure to raise it at trial resulted in procedural default. *Ibid.* The Texas Court of Criminal Appeals affirmed. *Id.* at 2a-3a.

3. Petitioner then sought federal habeas corpus, based on the Vienna Convention. Pet. App. 3a. The district court rejected that claim. *Ibid.* While petitioner's application for a certificate of appealability was pending in the Fifth Circuit, the ICJ decided *Avena*. *Id.* at 86a-186a.

In *Avena*, the ICJ determined that the United States had violated Article 36(1)(b) of the Vienna Convention, 21 U.S.T. 101, 596 U.N.T.S. 292, by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 183a, para. 153(4) and (5). The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." *Id.* at 185a, para. 153(9). The ICJ indicated that review and reconsidera-

tion should occur through a judicial process, *id.* at 174a, para. 140-141, that the relevant inquiry was whether the treaty violation caused actual prejudice to the defendant, *id.* at 165a, para. 121, and that procedural default rules could not bar that review. *Id.* at 160a-161a, para. 113.

The Fifth Circuit denied petitioner's application for a certificate of appealability, holding that petitioner had procedurally defaulted his Vienna Convention claim and that the Vienna Convention does not confer an individually enforceable right. *Medellin* v. *Dretke*, 371 F.3d 270, 280 (2004). This Court granted review. See *Medellin* v. *Dretke*, 543 U.S. 1032 (2004).

Before the Court heard argument in *Medellin*, the President determined that "the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. Relying on the President's determination and *Avena*, petitioner filed an application in the Texas Court of Criminal Appeals for state habeas corpus review. *Id.* at 4a-5a. Because that state-court proceeding might provide petitioner with the review and reconsideration he sought, and because threshold procedural issues could independently bar federal habeas review, this Court, after argument, dismissed the petition for a writ of certiorari in *Medellin* as improvidently granted. *Medellin* v. *Dretke*, 544 U.S. 660, 664 (2005) (per curiam).

4. The Texas Court of Criminal Appeals dismissed petitioner's application, holding that the *Avena* decision and the President's determination "do not constitute binding federal law" and therefore do not preempt the State's prohibition against the filing of successive habeas corpus applications. Pet. App. 64a.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals erred by failing to implement the President's determination to have state courts give effect to *Avena*. While the ICJ's decision in *Avena* is not privately enforceable in its own right, the President's determination that the Nation will comply with *Avena* falls within his authorized power to effectuate our treaty obligations.

I. A. By virtue of the Optional Protocol and the United States' ratification of the U.N. Charter, the United States has an international law obligation to comply with the ICJ's decision in *Avena*. That decision requires the United States courts to provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals addressed in that decision. The President disagrees with the legal interpretations underlying the ICJ's decision, and was faced with a decision whether to comply with the United States' treaty obligations. But the United States has compelling interests in ensuring reciprocal observance of the Vienna Convention by treaty partners who detain U.S. citizens, promoting foreign relations, and reaffirming the United States' commitment to the international rule of law. Those competing concerns justified the President in determining to discharge the Nation's obligations under *Avena*, while withdrawing from the Optional Protocol to prevent the ICJ from imposing similar obligations on the United States in the future.

B. The President's actions are justified by his authority to implement the Optional Protocol and the U.N. Charter. That authority should be construed in light of the President's well-established constitutional and statutory powers in the realm of foreign affairs and his historically accepted lead role in responding to ICJ decisions. Presidential foreign-affairs actions taken pursuant to treaties, like Presidential actions taken pursuant to a statute, should be upheld unless the fed-

eral government as a whole lacks authority to deal with the matter. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring).

Here, several factors support the view that the President is authorized to determine whether and how to comply with the ICJ's decision. First, the President is constitutionally charged with making and is uniquely qualified to make the prompt and sensitive determinations involved. Second, the President has recognized authority to resolve disputes with foreign nations over individual claims, and to establish binding rules of decision that preempt contrary state law. See, *e.g. American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Those powers make him the logical figure to take the lead in responding to treaty-authorized dispute resolutions by the ICJ. Third, federal statutes acknowledge the President's role in representing the Nation in the ICJ and the U.N. Security Council—the only forum in which the prevailing party in the ICJ can seek enforcement in the event of non-compliance—and to protect Americans abroad. Fourth, the President in a variety of litigation contexts has provided the source of law in controversies touching foreign relations and can bring suit in our courts to enforce treaty obligations. And fifth, the President has taken the responsibility to comply (or not to comply) with past ICJ decisions, and Congress has acquiesced in those actions.

C. The court below did not agree on a single rationale for setting aside the President's determination. But none of the separate opinions offered a persuasive basis for doing so. Contrary to the opinions below, the President's action does not intrude on the independence of the judiciary. This Court's decision in *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006), authoritatively interpreted the Vienna Convention generally, but the President's action does not supplant that interpretation. It simply provides for the enforcement of a

judgment as to 51 specific individuals—a judgment with which the United States is obligated by treaty to comply. The law of judgments has long held that a domestic court may recognize a decision as binding, without adopting—indeed, while disagreeing with—its legal reasoning. The President's action is of the same character.

Nor is the President's action invalid because it is not reflected in a new executive agreement with Mexico. The United States is already party to treaties that required it to submit Vienna Convention disputes to the ICJ and to comply with its decisions. The President's freedom of action would be sharply curtailed, and the Nation hamstrung, if the President were required to secure a foreign government's agreement before he could bring the Nation into compliance with treaty-based obligations.

The President's action is not invalid on the theory that it unduly intrudes on federalism. The Supremacy Clause makes the national government's action binding on the States when it acts under a valid treaty. In any event, the compelling national interests served by the President's determination outweigh the relatively modest intrusion on State interests here. The President's determination is precisely tailored to achieve compliance with *Avena*: it requires state courts to provide review and reconsideration; it does not foreordain outcomes.

Finally, the President's memorandum is sufficient to create a binding legal rule. Nothing in the Constitution requires a Presidential determination to take a particular form in order to preempt conflicting state requirements.

D. The State objects that the treaty obligation to comply with *Avena* is not self-executing, and it suggests the President therefore cannot implement it domestically. But while the obligation to comply with *Avena* is not self-executing, that simply means that it may not be privately enforced in courts of the United States without further Presidential or congres-

sional action. The State also errs in suggesting that the U.N. Charter means that only in the Security Council may an ICJ decision be enforced. That remedy allows a prevailing nation in the ICJ to seek enforcement of the ICJ decision; it does not speak to the President's power domestically to comply with the Nation's treaty-based obligations so as to avoid an enforcement action in the Security Council.

II. Absent a Presidential determination, the ICJ's decision in *Avena* could not be enforced in this Nation's courts. It is the President who is authorized to determine whether and how the United States will comply with an ICJ decision. Permitting direct judicial enforcement would circumvent the President's critical role in deciding whether *or not* to comply with our treaty obligations and would inappropriately inject the judiciary into sensitive matters of foreign affairs. The relevant treaties do not contemplate such direct enforcement, and the *Avena* decision by its terms calls for a determination how it should be applied—a determination that the courts cannot make for the United States.

ARGUMENT

I. THE PRESIDENT VALIDLY DETERMINED TO HAVE STATE COURTS GIVE EFFECT TO AVENA

The United States has a treaty-based obligation to comply with the *Avena* decision, and the President validly discharged that obligation by having state courts give effect to that decision. The Texas Court of Criminal Appeals erred in holding otherwise.

A. The United States Has An Obligation To Comply With *Avena*, And The President Has Determined That It Is In The Nation's Interest To Fulfill That Obligation

1. Through ratification of the Optional Protocol, the United States agreed that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" could be submitted to the ICJ for binding resolution. Optional Protocol Art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Pursuant to the Optional Protocol, Mexico asked the ICJ to resolve a dispute between it and the United States over the meaning of the Vienna Convention as applied to the convictions and sentences of 51 Mexican nationals who had not been advised of their right to consular notification. The ICJ resolved that dispute by requiring review and reconsideration of the convictions and sentences of those 51 individuals through a judicial process that would determine whether the failure to receive notification prejudiced the defense.

Through ratification of the U.N. Charter, the United States agreed that an ICJ decision would have "binding force * * * between the parties and in respect to that particular case." Statute of the International Court of Justice (ICJ Statute) Art. 59, 59 Stat. 1062. It further agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter Art. 94(1), 59 Stat. 1051. As a result of those treaty provisions, the ICJ decision in *Avena* has "binding force," and the United States has an international law obligation to "comply with the decision" by providing judicial review and reconsideration to 51 Mexican nationals.[1]

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[1] The term "decision" refers to what in United States practice would be called the judgment, and that is the only part of an ICJ opinion with which the United States must comply. The United States is not obligated to acquiesce in

2. The President does not agree with the ICJ's interpretations of the Vienna Convention. Nonetheless, the President recognized that the United States had, pursuant to the Optional Protocol, agreed to resolution of the dispute by the ICJ, and that it has an obligation under the U.N. Charter to comply with that decision. To discharge that obligation—and thereby to protect the interests of United States citizens detained abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment to the rule of law—the President determined to have state courts perform the review and reconsideration required by the *Avena* decision. At the same time, the President recognized that permitting disputes of this kind to be resolved authoritatively by the ICJ can result in harm to this country's interests. Accordingly, after announcing his decision to comply with *Avena*, the President withdrew from the Optional Protocol, foreclosing the possibility that the ICJ would apply its erroneous interpretation against the United States in future cases. As we now demonstrate, the President's carefully calibrated response to *Avena* falls within the President's authority to effectuate and direct compliance with the relevant treaties.

B. The President's Determination Is Authorized By The Optional Protocol And The U.N. Charter As Informed By The President's Constitutional And Statutory Powers

In assessing the scope of Presidential power, the Court has found Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), to be "analytically useful." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981). In that opinion, Justice Jackson classified executive action into three familiar categories.

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the ICJ's legal reasoning, and it has not acquiesced in the legal reasoning in *Avena*. See *Sanchez-Llamas*, 126 S. Ct. at 2685.

First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Action within that first category is constitutional, unless the federal government "as an undivided whole lacks power." *Id.* at 637. Second, "[w]hen the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Ibid.* In that second category, "congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Ibid.* Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Ibid.* In that third category, "[c]ourts can sustain exclusive presidential control * * * only by disabling the Congress from acting." *Id.* at 637-638.

The Court has not specifically addressed how to assess Presidential action under the authority of a treaty. But it seems clear that when the President acts pursuant to a duly ratified treaty and his own constitutional authority, he acts with the full authority of the United States, and his authority is at its zenith. A treaty, after all, requires ratification by two-thirds of the members of the Senate, U.S. Const. Art. II, § 2, Cl. 2, and therefore Presidential action that is expressly or implicitly authorized by a treaty is akin to Presidential action that falls within the first category. Such action is valid unless the federal government "as an undivided whole lacks power." *Youngstown*, 343 U.S. at 637 (Jackson, J., concur-

ring); see *Wilson* v. *Girard*, 354 U.S. 524 (1957) (upholding the President's executive agreement to permit the trial of a United States citizen by Japanese authorities on the ground that it was implicitly authorized by a treaty).

Under that analysis, the President acted within his authority when he determined to have state courts give effect to *Avena*. The Optional Protocol and the U.N. Charter create an obligation to comply with *Avena*, and those treaties implicitly give the President authority to implement that treaty-based obligation on behalf of the Nation. That understanding of the Optional Protocol and the U.N. Charter is informed by the President's established constitutional and statutory powers.[2]

1. The President's constitutional role makes him uniquely suited to respond to an ICJ decision

Determining whether and how to comply with an ICJ decision raises sensitive foreign policy issues that the President's constitutional role uniquely qualifies him to resolve. It therefore makes sense to read the Optional Protocol and U.N. Charter to allow the President to decide whether and how to comply with an ICJ decision.

This case illustrates the kind of sensitive foreign policy issues that bear on compliance with and implementation of an ICJ decision. Among the issues raised are: (1) the importance of securing reciprocal protection of Americans detained abroad; (2) the need to avoid harming relations with foreign governments, including Mexico; and (3) the interest in reinforcing the United States' commitment to the rule of law. The President is in the best position to make a determination on

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[2] In the particular context of Presidential decisions whether or not to comply with ICJ decisions, Congress has routinely allowed the President to respond and has not directly acted. See pp. 19-21, *infra*. At an absolute minimum then, this case involves a valid Presidential action in the context of Congressional "acquiescence."

those issues because the President, "not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries," and it is the President who is responsible for the conduct of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). The Executive Branch, not Congress, discharges the consular function on behalf of Americans abroad in hundreds of consulates and embassies around the globe, and the President has the primary responsibility in managing the multifarious considerations implicated by a critical bilateral relationship like that between the United States and Mexico.

Another advantage of allocating to the President the lead role in responding to an ICJ decision is his ability to respond expeditiously. The Executive Branch, unlike the legislative branch, is structurally designed to act with "dispatch." *The Federalist, No. 70*, at 472 (A. Hamilton) (J. Cooke ed. 1961). That structural difference is significant because a substantial delay in obtaining compliance with an ICJ decision may endanger the very foreign policy objectives that compliance is designed to achieve.

In ratifying the Optional Protocol and the U.N. Charter, the Senate would necessarily have been aware that the President is responsible for and best positioned to address the sensitive foreign policy issues implicated by an ICJ decision, and to do so expeditiously. Ratification of those treaties should therefore be understood as entrusting the President with the authority to determine whether and how best to implement an ICJ decision.

2. The President has independent authority to resolve disputes with foreign nations

a. The President's exercise of authority to implement an ICJ resolution also rests on the President's long established authority to resolve disputes with foreign nations, particularly

those involving international claims. That established authority forms an important backdrop for assessing the extent of the authority that the Optional Protocol and the U.N. Charter confer on the President.

The President has exercised authority to settle disputes with foreign nations involving international claims since at least 1799, and between 1817 and 1917, Presidents entered into 80 such agreements. *Dames & Moore*, 453 U.S. at 679 n.8. In the modern era, Presidents have continued to enter into executive claim settlement agreements. For example, between 1952 and 1980, the President entered into at least ten binding settlements with foreign nations. *Id.* at 680.

In a series of cases, the Court has upheld the President's authority to determine individual rights as part of settling disputes with foreign nations. *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396 (2003); *Dames & Moore*, *supra*; *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1937). The President may exercise this dispute resolution authority without seeking the consent of the Senate or approval from Congress, *Garamendi*, 539 U.S. at 415; *Dames & Moore*, 453 U.S. at 682-683; *Pink*, 315 U.S. at 223, 229; *Belmont*, 301 U.S. at 330, and the exercise of such authority preempts conflicting state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 310 U.S. at 327, 331.

b. In *Belmont*, the Court upheld the validity of an executive agreement that resulted from an exchange of diplomatic correspondence between the United States and the Soviet Union. 301 U.S. at 326. Under the agreement, the Soviet Union assigned to the United States its claims against American nationals, including certain claims against banks. *Ibid.* The lower courts refused to enforce the United States' assignment-based claim against a bank on the ground that the Soviet Union's nationalization policy was confiscatory and

therefore violated state public policy. *Id.* at 327. The Court reversed, holding that "no state policy can prevail against the international compact here involved." *Ibid.* The Court reasoned that "the external powers of the United States are to be exercised without regard to state law or policies," that "[t]he supremacy of a treaty in this respect has been recognized from the beginning," and that "all international compacts and agreements" are subject to "the same rule." *Id.* at 331. The Court also held that the agreement did not "require the advice and consent of the Senate." *Id.* at 330. In *Pink*, the Court reaffirmed that the executive agreement prevailed over conflicting state law, explaining "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement." *Id.* at 230-231.

In *Dames & Moore*, the Court upheld the validity of an executive order suspending claims by United States nationals against Iran filed in United States courts, including state law claims in state court. 453 U.S. at 686. The executive order implemented an executive agreement with Iran to "terminate" all legal proceedings in the United States courts involving claims against Iran so that they could be resolved in an Iran-United States Claims Tribunal. *Id.* at 665. The Court found that the President's suspension of claims was not authorized by statutes, *id.* at 675-677, but concluded that those statutes "invite[d]" the President's action because they gave the President broad authority in "closely related" areas. *Id* at 678 (citation and internal quotation marks omitted). The Court also relied on the President's "longstanding practice of settling * * * claims by executive agreement without the advice and consent of the Senate," *id.* at 679, reasoning that Congress had through acquiescence "implicitly approved" that practice. *Id.* at 680.

In *Garamendi*, the Court invalidated a state law that required insurers doing business in the State to disclose information about Nazi-era insurance policies. 539 U.S. at 401. The President had entered into agreements with foreign governments to encourage the establishment of voluntary compensation funds for persons who had claims for unpaid Nazi-era insurance. *Id.* at 421-422. The Court held that the state law conflicted with the policy reflected in the President's agreements and was therefore preempted. *Id.* at 416-417. The Court reasoned that its decisions in *Dames & Moore*, *Pink*, and *Belmont* had "recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification or approval by Congress," *id.* at 415, and that "valid executive agreements are fit to preempt state law, just as treaties are." *Id.* at 416. The Court noted that the agreements at issue did not expressly preempt state law, *id.* at 417, but it concluded that statements of Executive Branch officials made clear that the state law impermissibly interfered with the policy reflected in the agreements. *Id.* at 421-425.

c. The President's determination pursuant to the Optional Protocol and U.N. Charter is an exercise of this dispute-resolution power. The President's determination to accept and implement the ICJ's decision resolves the dispute between the United States and Mexico over the ability of 51 individuals to secure review and reconsideration of their convictions and sentences. In crucial respects, the President exercises a more modest power in implementing the *Avena* decision than in entering into claims settlement agreements in other contexts. First, the range of possible international disputes subject to executive settlement is potentially quite extensive, while responsibility for complying with particular ICJ decisions is constrained by the particular decision and the relatively nar-

row scope of disputes subject to ICJ jurisdiction by virtue of a Senate-ratified treaty.

Second, in each of the settlement cases, the President decided on the terms of the settlement without explicit sanction from the Senate or Congress. In contrast, here the President is acting pursuant to the Optional Protocol and the U.N. Charter, and those treaties, in combination, expressly provide for resolution of these types of disputes by a binding decision of the ICJ. Once the ICJ issues such a Senate-authorized resolution of a dispute, only the question of implementation remains. In light of the President's established authority to resolve disputes with a foreign government over the claims of individuals without Senate or congressional approval, the Optional Protocol and the U.N. Charter should be understood to recognize, and to provide the President with, the more modest implementation authority exercised here.

3. The President has statutory responsibilities that are closely related to the authority he exercised here

In evaluating the scope of the President's authority under the Optional Protocol and the U.N. Charter, it is also appropriate to examine the President's statutory authority in closely related areas. Cf. *Dames & Moore*, 453 U.S. at 678 (statutes that give the President broad authority invite Presidential action in closely related areas). Of particular importance, Congress has expressly authorized the President to direct all functions connected with the United States' participation in the United Nations. See 22 U.S.C. 287, 287a. Pursuant to that authority, the President represents the United States in cases before the ICJ. The President also has responsibility to represent the United States before the Security Council. If the United States decided not to comply with an ICJ decision, the other party to the decision could seek to enforce the decision in the Security Council. See U.N. Char-

ter, Art. 94(2), 59 Stat. 1051. If the United States sought relief from the ICJ, there would be no question that the President would be responsible for obtaining a favorable decision and securing its enforcement. The converse is also true. A logical and coherent scheme is established when the same person who represents the United States before the ICJ and before the Security Council in the event of an enforcement action also has authority to implement the Nation's treaty obligations if he so determines.

It is also significant that Congress has given the President broad authority to secure the release of citizens detained abroad. 22 U.S.C. 1732. While that statute does not authorize the President to implement an ICJ decision relating to consular access, it demonstrates Congress's recognition that the President is in the best position to determine what actions to take to protect Americans citizens detained abroad. Cf. *Dames & Moore*, 453 U.S. at 678.

4. The President has an established role in litigation implicating foreign policy concerns

a. The President's claim of authority under the Optional Protocol and the U.N. Charter to implement an ICJ decision also draws strength from contexts in which the Executive Branch has exercised authority to determine whether an international rule of law should be applied in domestic courts. For example, before enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, the Executive Branch determined whether a foreign sovereign should receive immunity from suit, and courts were required to give effect to those determinations. See *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486-487 (1983); *Mexico* v. *Hoffman*, 324 U.S. 30, 33-36 (1945); *Ex parte Peru*, 318 U.S. 578, 586-590 (1943).

In *Ex parte Peru*, a libel action was filed against a steamship owned by Peru. The Under Secretary of State wrote a letter to the Attorney General asking him to communicate to the court that the State Department recognized and allowed Peru's claim of immunity, and the Attorney General filed that letter with the court. 318 U.S. at 581. This Court held that the State Department's letter required dismissal of the suit, explaining that "[u]pon recognition and allowance of the claim [of immuniity] by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations." *Id.* at 588. After the State Department adopted a more restrictive view of sovereign immunity that was formalized in a letter from the Acting Legal Adviser Jack B. Tate to the Acting Attorney General, *Verlinden*, 461 U.S. at 487 & n.9, "courts [still] abided by 'suggestions of immunity' from the State Department." *Id.* at 487.[3]

The Executive Branch's authoritative role in litigation implicating foreign affairs extends beyond determinations of foreign sovereign immunity. The Executive Branch also authoritatively determines which governments are entitled to sue in our courts, *Pfizer, Inc.* v. *India*, 434 U.S. 308, 319-320 (1978), and whether a treaty remains in force. See *Terlinden* v. *Ames*, 184 U.S. 270, 285 (1902). The pivotal role of the Executive Branch in supplying the rule of decision in litigation implicating sensitive foreign policy considerations bolsters the conclusion that the Optional Protocol and the U.N. Charter authorize the President to implement the United States' obligation to comply with *Avena* by having state courts give effect to that decision.

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[3] That practice continued until enactment of the FSIA established a statutory standard for dismissals based on sovereign immunity. *Verlinden*, 461 U.S. at 487.

b. The President's authority to file suit to enforce a treaty without express statutory authorization further demonstrates the President's unique role in litigation implicating foreign policy concerns. See *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). In *Sanitary District*, the United States brought suit against a municipality that was withdrawing water from Lake Michigan in violation of a treaty with Great Britain that prohibited the withdrawal without the agreement of the United States and Canada. The Court held that the Executive Branch had standing "to carry out treaty obligations to a foreign power," and that "no statute [was] necessary to authorize the suit." *Ibid.*

Under the analysis in *Sanitary District*, the President would have authority to sue a State to enforce the United States' treaty obligation to give effect to the *Avena* decision. But the President should not be required to engage in such coercive, disruptive, and inefficient litigation in order to ensure compliance with that treaty obligation. Instead, the Optional Protocol and the U.N. Charter authorize the President to insist that state courts give effect to *Avena* without the necessity of the Executive Branch filing its own case in federal court.

5. The President has assumed responsibility for responding to previous ICJ decisions

Practice also supports the President's claim of authority under the Optional Protocol and the U.N. Charter to respond authoritatively to an ICJ decision. During the time that the United States has submitted disputes to the ICJ for resolution, the ICJ has rendered five decisions that have called for implementation by the United States, including *Avena*.[1] In

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[1] *See Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176 (Aug. 27); *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986

each case, the Executive Branch made the decision on how to respond to the ICJ decision. And in each case, Congress acquiesced in that response. Cf. *Dames & Moore*, 453 U.S. at 678 (finding relevant a "history of congressional acquiescence" in Presidential authority).

The cases illustrate the range of issues that have come before the ICJ and the way in which the Executive Branch has responded. For example, in *Nicaragua* v. *United States*, the ICJ decided that the United States owed reparations to Nicaragua for its military activities in that country. 1986 I.C.J. 149. The President determined that the United States would *not* comply with the ruling, and when Nicaragua attempted to raise the issue in the Security Council, the President's representative vetoed the resolution.

In *Gulf of Maine*, United States and Canada agreed in a treaty and two related agreements to submit a boundary dispute to the ICJ for a binding resolution. 1984 I.C.J. 246. After the ICJ determined the precise boundary lines, *id.* at 345, para. 243, the Secretary of State adopted the new coordinates for mapping purposes and instructed the National Oceanic and Atmospheric Administration (NOAA) to use the ICJ line as the limit of the United States' Exclusive Economic Zone. The NOAA then issued a final rule presenting the new boundary line in accordance with the ICJ's determination. 49 Fed. Reg. at 43,676.

In *LaGrand*, the ICJ issued provisional measures to prevent Walter LaGrand's execution. 2001 I.C.J. 479, para. 32. The Executive Branch construed the provisional measures as not binding, but it transmitted the ICJ's order to the Governor of Arizona. 2001 I.C.J. 506-507, para. 111. The ICJ ultimately determined that the United States had violated its

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I.C.J. 14 (June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

obligation to give consular notification and that the United States should, by a means of its own choosing, allow review and reconsideration of convictions and sentences of German nationals denied consular notification in the future. 2001 I.C.J. 515-516, para. 128(3)-(4), (7). In response to the decision, the Executive Branch determined that review and reconsideration should occur through the clemency process when avenues for judicial review were exhausted under domestic law. The State Department therefore sent letters to Governors, parole boards, and clemency boards encouraging them to consider the violations of the right to consular notification in cases involving the death penalty.

Thus, the Executive Branch, and not the Congress, has consistently assumed responsibility for responding to an ICJ decision whether the response took the form of compliance or non-compliance. And the Congress has taken no action to suggest disagreement with that course. *Garamendi*, 539 U.S. at 429. That consistent practice supports the conclusion that the President validly took responsibility for responding to the ICJ's decision in this case without the need for a legislative enactment.

C. The Reasons Offered By The Court Below For Invalidating The President's Determination Are Unpersuasive

No majority of the court below joined a single opinion invalidating the President's determination. The various opinions offer four different reasons, but none is persuasive.

1. Relying on *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669 (2006), the plurality concluded that the President "has exceeded his constitutional authority by intruding into the independent powers of the judiciary" to determine "what law to apply" and "how to interpret the applicable law." Pet. App. 30a. The President's determination, however, does not conflict with *Sanchez-Llamas* or intrude on the judiciary.

a. In *Sanchez-Llamas*, the Court held that the ICJ in *Avena* had erroneously interpreted the Vienna Convention to displace ordinary procedural default rules, and it therefore failed to defer to the ICJ's interpretation. 126 S. Ct. at 2685-2687. The President likewise has determined that the ICJ's interpretation of the Vienna Convention is flawed. But neither the President's view nor the Court's holding in *Sanchez-Llamas* relieves the United States of its treaty-based obligation under the *Avena* decision to afford 51 Mexican nationals review and reconsideration of their convictions and sentences. Under the Optional Protocol and the U.N. Charter, the *Avena* decision (or judgment as it would be called in American practice) continues to impose a treaty-based obligation on the United States "to comply with the decision" without regard to the merits of the treaty interpretation that led to the decision. Article 59 of the ICJ statute, 59 Stat. 1062; Art. 94(1), 59 Stat. 1051. The President's determination fulfills that obligation to comply with the ICJ's decision; it hardly reflects agreement with the ICJ treaty interpretation, which has been rejected by the President and the Court in *Sanchez-Llamas*.[3]

Nor is enforcement of the *Avena* decision precluded by United States' disagreement with the ICJ's interpretation of the Vienna Convention. It is inherent in international adjudication that an international tribunal may reject one country's legal position in favor of another's—and the United States explicitly accepted this possibility when it ratified the Optional Protocol. The law of judgments also contemplates that a court will generally enforce a foreign judgment without regard to its legal merits. *Hilton* v. *Guyot*, 159 U.S. 113, 202

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[3] Indeed, the President advocated the interpretation of the Vienna Convention that the Court adopted in *Sanchez-Llamas*. 126 S. Ct. at 2685. And the President withdrew from the Optional Protocol to ensure that the ICJ's erroneous interpretation could not result in future ICJ decisions that would bind the United States. See pp. 1-2, *supra*.

(1895). The President's determination and the resulting judicial role in giving effect to the President's determination is consistent with that general rule.

b. The President's determination also does not impermissibly intrude on the judicial role. As in analogous contexts, the determination supplies the substantive rule of law for the court to apply; it does not divest the court of its authority to interpret that rule and apply it to the particular facts.

The Court's cases establish that the President does not intrude on the judicial role when he supplies a rule of law for the court to apply. In all of the executive agreement cases (*Belmont*, *Pink*, *Dames & Moore*, and *Garamendi*), as well as the sovereign immunity cases (*e.g. Ex parte Peru*), the President supplied a rule of law for the court to apply. In *Dames & Moore*, the Court made clear that such action does not intrude on a court's role. In that case, the Court squarely rejected the argument that the President's order suspending claims against Iran intruded on the court's Article III power, explaining that the President "had simply effected a change in the substantive law governing the lawsuit." 453 U.S. at 684-685. That reasoning is equally applicable here.

2. The plurality also concluded that the President's action is invalid because it takes the form of unilateral action, rather than an agreement with Mexico. Pet. App. 43a. That rationale ignores the crucial fact that the United States and Mexico had already agreed through the Optional Protocol and the U.N. Charter to resolve their dispute by submitting it to the ICJ for a binding decision. Once the ICJ issued its decision, a further agreement would be superfluous. The President simply had to decide whether and how to comply with the United States' resulting treaty obligations.

The plurality's rationale also needlessly hamstrings the President's authority to fulfill the United States' treaty obli-

gations. Securing yet another agreement may be time-consuming when the President has determined that swift action is required. A government may be unwilling to enter a successive agreement, yet may nonetheless be willing to acquiesce in the President's implementation of a preexisting one. And the precondition imposed by the plurality would effectively give a foreign government a veto power over the President's exercise of authority under treaties of the United States.

3. In a separate opinion, Presiding Judge Keller concluded that the President's determination violated principles of federalism because she viewed the national interest served by the President's determination as weak, and the State's interest in failing to comply with the President's determination as strong. Pet. App. 69a-71a. But where, as here, the President acts pursuant to his authority under valid treaties of the United States, principles of federalism do not stand as an obstacle. To the contrary, federal law is supreme, and state law must give way. See p. 13, *supra*.

In any event, the validity of the President's efforts' to comply with a treaty obligation cannot possibly turn on a state court's application of an ill-defined balancing test. The responsibility for balancing the costs of compliance with a treaty obligation, including the costs in terms of federal-state relations, belongs to the President. Here, the President determined that promoting the international rule of law and protecting Americans abroad require implementation of *Avena*, and those interests are compelling.

At the same time, the Presidential determination intrudes no more on state authority than is necessary to fulfill the United States' treaty obligation to comply with *Avena*. As *Avena* requires, the President's determination mandates review and reconsideration without regard to procedural default principles, but it does not divest state courts of authority to

resolve the underlying claims. Nor does the President's determination require state courts to reach a particular outcome. Instead, it requires only that the States that violated their Vienna Convention obligation to notify 51 Mexican nationals of their right to consular access determine whether their violations prejudiced the defense. The President's determination thus respects the States' traditional role in deciding the merits of the claims of criminal defendants who seek to overturn their convictions or sentences, while ensuring that the United States discharges its treaty-based obligation under the ICJ's decision.

The Court's decisions have recognized the President's authority to displace state causes of action completely in order to settle international disputes. See *Garamendi*, 539 U.S. at 427. The result here is far less intrusive. Moreover, to the extent that there is an intrusion on state interests, it is traceable to the Senate-ratified Vienna Convention itself, and to the State's violation of the Convention. That Convention imposes on the United States an obligation relating to consular access that by necessity requires the cooperation of state and local officials to ensure compliance. And, by virtue of the Supremacy Clause, Art. VI, Cl. 2, the requirements of the treaty supersede state and local laws. The additional intrusion on States that occurs when an international tribunal imposes an obligation on the United States through a decision made binding by the Optional Protocol and the U.N. Charter is no greater than the intrusion inherent in the Convention (which is not challenged on federalism grounds here) and pales in comparison with the federal interest in treaty compliance.

4. Judge Cochran concluded that because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. Pet. App. 76a-79a. Nothing in the United States Constitution,

however, requires a Presidential directive to take any particular form for it to have binding effect. The terms of the President's determination make clear that it was intended to have the legal effect of discharging the United States' obligation by having state courts give effect to the *Avena* decision in the case of 51 identified individuals. *Id.* at 187a. Nothing more was required to make it binding law.

Indeed, in *Ex parte Peru*, the Court gave effect to an immunity determination expressed in a State Department letter to the Attorney General. 318 U.S. at 581, 588. And in *Belmont* and *Pink*, the Court accepted as binding law an executive agreement that resulted from an exchange of letters between a Russian Government official and the President. *Pink*, 315 U.S. at 211-212; *Belmont*, 324 U.S. at 326. The binding nature of a President's determination does not depend on its form.

D. The State's Additional Arguments Are Without Merit

The State challenges the validity of the President's determination on two additional grounds. First, the State contends (Br. in Opp. 19) that because the obligation to comply with *Avena* is not self-executing, the President lacks power to implement the decision. That contention lacks merit. While the United States' obligation to comply with *Avena* is not self-executing, that simply underscores that the President has an important intervening role in deciding whether or not the United States will comply with a decision such as *Avena*. If the decision were privately enforceable, it would essentially eliminate the President's role in deciding whether to comply.

The State cites two cases that describe a treaty that is not self-executing as one that requires action by the legislative branch to make it judicially enforceable. Br. in Opp. 19-20 n.10 (citing *Whitney* v. *Robinson*, 124 U.S. 190, 194 (1883), and *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829)). But

neither of those cases addressed treaties in which the United States agreed to submit a dispute to an international body for resolution and further agreed that the decision of that international body would be binding. Nor did either of those cases involve a claim by the President that the applicable treaties authorized him to fulfill the United States' treaty obligation by having courts give effect to that resolution. Moreover, even with the President's determination, the treaty obligation to comply with the *Avena* decision remains non-self executing. It is ultimately the President's determination, not the treaty, that provides state courts with the rule of decision.

The State similarly errs in contending (Br. in Opp. 22-23) that the provision in the U.N. Charter that permits a party to the agreement to seek enforcement of an ICJ decision in the Security Council, see Art. 94(2), 59 Stat. 1051, shows that the obligation to comply with an ICJ decision may be enforced only diplomatically or politically, and not through domestic courts. That U.N. Charter provision simply recognizes that the political branches of a Nation may choose *not to comply* with an ICJ decision, and provides that, in that event, recourse to the Security Council is the sole remedy. It does not address the situation where, as here, the President decides *to comply* with an ICJ decision and exercises authority under treaties to make the decision judicially enforceable.

II. THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE ABSENT THE PRESIDENT'S DETERMINATION

Petitioner contends (Pet. 24-26) that the *Avena* decision is privately enforceable of its own force because the Optional Protocol and the U.N. Charter obligate the United States to comply with the decision. That contention lacks merit.[7]

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[7] If the Court decides that state courts must provide review and reconsideration, *by virtue of the President's determination*, there is no need for the Court

For the reasons previously discussed, the Optional Protocol and the U.N. Charter give the President the authority to decide whether the United States will comply with an ICJ decision, and if so, what measures should be taken to comply. Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations and inappropriately transfer them to the courts. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005). In the context of this case, it would eliminate noncompliance—which is a possibility contemplated by the U.N. Charter—as an option. Thus, far from being supported by the Optional Protocol and the U.N. Charter, private enforcement of an ICJ decision, without Presidential authorization, conflicts with those treaties.

Moreover, while the Optional Protocol and the U.N. Charter together create an international obligation to comply with an ICJ decision, the text of those treaties forecloses the argument that an ICJ decision is privately enforceable on its own force. Cf. *Sanchez-Llamas*, 126 S. Ct. at 2679. The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the [Vienna Convention] shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." 21 U.S.T. at 326, 596 U.N.T.S. at 488. That provision gives a nation a right to invoke the jurisdiction of the ICJ; it does not give a private individual a right to enforce an ICJ decision in a United States court.

Article 94 of the U.N. Charter provides that "[e]ach member of the United Nations *undertakes to comply* with the deci-

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to address the question whether the *Avena* decision would be privately enforceable in the absence of that determination.

sion of the International Court of Justice in any case to which it is a party." 59 Stat. 1051 (emphasis added). Those words "do not by their terms confer rights on individual citizens; they call upon governments to take certain action." *Committee of United States Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (citation and quotation marks omitted).

The text of the ICJ statute, which is incorporated into the U.N. Charter, speaks to the issue even more directly. It makes clear that an ICJ decision is binding only "between the parties" to the case, Art. 59, 59 Stat. 1062, and that only nations "can be parties." Art. 34, 59 Stat. 1059. Accordingly, in the absence of the President's determination, a private party cannot enforce an ICJ decision in court.

Nor does the ICJ decision purport to be privately enforceable of its own force. The ICJ determined that the United States' obligation was "to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the [affected Mexican nationals.]" Pet. App. 185a (emphasis added). Permitting private judicial enforcement in the absence of action from the President or the Congress would deprive the political branches of the very choice of means that the ICJ intended for them to have. Thus, while petitioner is entitled to review and reconsideration *by virtue of the President's determination*, such review and reconsideration would not be available to petitioner in the absence of the President's determination.

CONCLUSION

The judgment of the Court of Criminal Appeals of Texas should be reversed.

Respectfully submitted.

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